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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Daniel T Doria,

No. CV-23-08112-PCT-SMB

Plaintiff,

ORDER

V.

Yelp Incorporated,

Defendant.

Pending before the Court is Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 14). Plaintiff filed a response (Doc. 16), to which Defendant replied (Doc. 18.) After considering the parties' arguments and relevant case law, the Court will grant Defendant's Motion.

I. BACKGROUND

This case arises from Plaintiff’s former employment with Defendant as an Account Executive. Plaintiff worked at Yelp from January 2022 to May 2022. (Doc. 1 at 8.) Following his termination and subsequent conversations with Defendant, Plaintiff filed a Complaint. (Doc. 1.) Plaintiff has since amended his Complaint twice, with the current operative Complaint being the Second Amended Complaint (“SAC”), which alleges that Defendant violated the Americans with Disabilities Act (“ADA”) and the Arizona Civil Rights Act (“ACRA”). (Doc. 12; Doc. 13 at 9–10 ¶¶ 45–50.) In the SAC, Plaintiff alleges that he internally reported fraud regarding Yelp’s scripted sales model and tuition reimbursement program. (Doc. 13 at 4 ¶ 16, 5 ¶ 19.) Plaintiff asserts that Defendant

1 brushed off his complaints and threatened to fire him. (*Id.* at 4 ¶ 17; 5 ¶ 20.) Plaintiff
 2 claims that Defendant's response sent him into a depressed and paranoid episode. (*Id.* at 4
 3 ¶ 17.) In turn, Plaintiff requested an accommodation, which he alleges was denied. (*Id.* at
 4 5 ¶¶ 21–22.) Plaintiff then formally requested leave through short term disability, which
 5 was granted. (*Id.* at 5–6 ¶¶ 24–25.) However, Defendant terminated Plaintiff's
 6 employment. (*Id.* at 7 ¶ 36.)

7 Shortly after terminating Plaintiff, Defendant offered Plaintiff a Separation
 8 Agreement ("the Agreement"). (Doc. 14-2 at 2–8.) Initially, Defendant offered to pay
 9 Plaintiff severance equivalent to four weeks of pay in exchange for signing the Agreement.
 10 (*Id.* at 3.) However, Plaintiff rejected this initial offer. (*Id.*) After further negotiations,
 11 Defendant increased its offer to six weeks of pay and sent the revised Agreement to
 12 Plaintiff on June 21, 2022. (*Id.*) Plaintiff then signed the Agreement on June 22, 2022.
 13 (*Id.*) The Agreement states, in relevant part:

14
 15 You hereby generally and completely release Yelp and its predecessors,
 16 successors, affiliates, parent and subsidiary entities, as well as each of their
 17 current and former directors, officers, employees, shareholders, partners,
 18 agents, attorneys, insurers, affiliates and assigns (collectively, the "Released
 19 Parties") of and from any and all claims, liabilities and obligations, both
 known and unknown, that arise out of or are in any way related to events,
 acts, conduct or omissions that occurred prior to or on the date that you sign
 this Agreement (collectively, the "Released Claims") . . .

20
 21 The Released Claims include, but are not limited to: (i) all claims arising out
 22 of or in any way related to your employment with Yelp, or the termination
 23 of that employment . . . [including] all federal, state and local statutory
 24 claims, including, without limitation, claims for discrimination,
 harassment, retaliation . . . or other claims arising under . . . the federal
 Americans with Disabilities Act [or] the Arizona Civil Rights Act. . . .

25 (*Id.* at 6–7.) Both parties signed this agreement. (*Id.* at 8.) However, next to his signature,
 26 Plaintiff included the words "in protest." (*Id.* at 8.) In response, Defendant contacted
 27 Plaintiff via email to clarify that the Agreement (1) is a final, binding, and enforceable
 28 contract; (2) that Plaintiff had seven days to decide whether he wanted to sign it; (3) that

1 Plaintiff entered into the Agreement of his own free will, and (4) that Plaintiff's inclusion
 2 of "in protest" does not change any of the above facts. (*Id.* at 10.) Plaintiff replied "Yep,
 3 that's all understood." (*Id.*)

4 Plaintiff also received a Dismissal and Notice of Rights letter from the United States
 5 Equal Employment Opportunity Commission ("EEOC"). (Doc. 15-2 at 2–3.) This letter,
 6 issued on February 21, 2023, required Plaintiff to file his suit within 90 days of receiving
 7 it. (*Id.*) Plaintiff received a similar Notice of Charge of Discrimination and Charge of
 8 Discrimination from the Arizona Attorney General's Civil Rights Division in regard to his
 9 ACRA claim. (Doc. 13-1.) This letter gave Plaintiff one year from the date he filed his
 10 charge with the Civil Rights Division to file a lawsuit. (*Id.*) Plaintiff filed this lawsuit on
 11 June 14, 2023. (Doc. 1.) Defendant now seeks to dismiss the SAC. (Doc. 14.)

12 **II. LEGAL STANDARD**

13 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a
 14 claim for lack of subject-matter jurisdiction. "Federal courts are courts of limited
 15 jurisdiction" and may only hear cases as authorized by the Constitution or Congress.
 16 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court has subject-
 17 matter jurisdiction over claims that "aris[e] under the Constitution, laws, or treaties of the
 18 United States" and over "civil actions where the matter in controversy exceeds the sum or
 19 value of \$75,000, exclusive of interest and costs, and is between" diverse parties. 28 U.S.C.
 20 §§ 1331, 1332(a). Because our jurisdiction is limited, it is to be presumed that a cause lies
 21 outside of it, and the burden of establishing jurisdiction is on the party asserting it.
 22 *Kokkonen*, 511 U.S. at 377.

23 "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for*
 24 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack "asserts that the
 25 allegations contained in a complaint are insufficient on their face to invoke federal
 26 jurisdiction." *Id.* In this circumstance, the court accepts the plaintiff's allegations as true
 27 and draws all reasonable inferences in the plaintiff's favor, then "determines whether the
 28 allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane*

1 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). “A ‘factual’ attack, by contrast, contests the
 2 truth of the plaintiff’s factual allegations, usually by introducing evidence outside the
 3 pleadings.” *Id.* In a facial attack, the Court’s inquiry is confined to the allegations in the
 4 complaint, while a factual attack permits the court to look beyond the complaint. *Savage*
 5 *v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2004).

6 Further, to survive a Rule 12(b)(6) motion for failure to state a claim, a complaint
 7 must meet the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a “short and plain
 8 statement of the claim showing that the pleader is entitled to relief,” so that the defendant
 9 has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl.*
 10 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47
 11 (1957)). This requirement is met if the pleader sets forth “factual content that allows the
 12 court to draw the reasonable inference that the defendant is liable for the misconduct
 13 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements
 14 of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*
 15 Plausibility does not equal “probability,” but requires “more than a sheer possibility that a
 16 defendant has acted unlawfully.” *Id.* A dismissal under Rule 12(b)(6) for failure to state
 17 a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient
 18 facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696,
 19 699 (9th Cir. 1988). A complaint that sets forth a cognizable legal theory will survive a
 20 motion to dismiss if it contains sufficient factual matter, which, if accepted as true, states
 21 a claim to relief that is “plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*,
 22 550 U.S. at 570). “Where a complaint pleads facts that are ‘merely consistent with’ a
 23 defendant’s liability, it ‘stops short of the line between possibility and plausibility of
 24 ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

25 In ruling on a Rule 12(b)(6) motion to dismiss, the well-pled factual allegations are
 26 taken as true and construed in the light most favorable to the nonmoving party. *Cousins v.*
 27 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). However, legal conclusions couched as
 28 factual allegations are not given a presumption of truthfulness, and “conclusory allegations

1 of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto*
 2 v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). A court ordinarily may not consider evidence
 3 outside the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *See United States v.*
 4 *Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). “A court may, however, consider materials—
 5 documents attached to the complaint, documents incorporated by reference in the
 6 complaint, or matters of judicial notice—without converting the motion to dismiss into a
 7 motion for summary judgment.” *Id.* at 908.

8 **III. DISCUSSION**

9 The Court will discuss three preliminary issues, then turn to the merits of the
 10 Motion.

11 **A. Sur-Reply**

12 Plaintiff then filed a response to Defendant’s reply brief. (*See* Doc. 19). Plaintiff
 13 has effectively attempted to file a sur-reply—an additional response to the moving party’s
 14 reply. Local Rule 7.2 permits motions, responses, and replies. *See* LRCiv 7.2 (a), (c)–(d).
 15 Sur-replies are impermissible, as they are not contemplated by the local rules. *See Armenta*
 16 v. Spencer, No. CV-16-00697-TUC-DCB, 2018 WL 4698648, at *1 (D. Ariz. Oct. 1, 2018)
 17 (“There is no provision for Sur-Replies.”). Therefore, the Court will strike this response
 18 (Doc. 19) in its entirety.

19 **B. Judicial Notice**

20 Defendant also filed a Request for Judicial Notice in Support of their Motion to
 21 Dismiss Plaintiff’s Second Amended Complaint. (Doc. 15.) This request asks the Court
 22 to take judicial notice of the Notice of Charge of Discrimination and Charge of
 23 Discrimination that Plaintiff filed with the Arizona Civil Rights Division (“ACRD”), as
 24 well as the Letter and Dismissal and Notice of Rights from the EEOC. (*Id.* at 1–2.) This
 25 letter from the EEOC is better known as a “right to sue” letter.

26 Generally, judicial notice is appropriate for “records and reports of administrative
 27 bodies.” *United States v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943,
 28 955 (9th Cir. 2008) (cleaned up). Courts regularly take judicial notice of certain EEOC

1 documents. *See, e.g., Reed v. Cognizant Tech. Sols.*, 2020 WL 3268691, No. CV-20-
 2 00061-PHX-SMB, at *1 n.1 (D. Ariz. June 16, 2020) (taking judicial notice of “EEOC
 3 complaint and the right-to-sue letter”); *Mazzorana v. Emergency Physicians Med. Grp., Inc.*, No. 2:12-CV-1837 JCM (PAL), 2013 WL 4040791, at *5 (D. Nev. Aug. 6, 2013)
 4 (taking judicial notice of EEOC charge). Additionally, the Court may consider matters of
 5 judicial notice without converting this Motion into a motion for summary judgment.
 6 *Ritchie*, 342 F.3d at 908.

7 Here, both documents are communications from administrative bodies to Plaintiff
 8 that allowed him to file these claims. Moreover, their accuracy is not in dispute. Therefore,
 9 the Court will take judicial notice of Plaintiff’s Notice of Charge of Discrimination and
 10 Charge of Discrimination that Plaintiff filed with the Arizona Civil Rights Division
 11 (“ACRD”) and the right to sue letter from the EEOC. (Doc. 15-1; Doc. 15-2.)

12 **C. Local Rule 12.1(c)**

13 In his response, Plaintiff asserts that Defendant failed to meet and confer in good
 14 faith regarding this Motion in violation of Local Rule 12.1(c). (Doc. 16 at 5.) This rule
 15 requires the moving party to include a certification that before filing the motion, they
 16 “notified the opposing party of the issues asserted in the motion and the parties were unable
 17 to agree that the pleading was curable in any part by a permissible amendment offered by
 18 the pleading party.” LRCiv. 12.1(c). In their reply, Defendant included the email
 19 correspondence between the parties conferring on this topic. (Doc. 18-1.) The Court has
 20 reviewed this correspondence and Defendant’s initial certification. (*Id.*; Doc. 14-1.) The
 21 Court finds that Defendant complied with the requirements of Local Rule 12.1(c).
 22 Therefore, the Court will not strike Defendant’s Motion.

23 **D. The Agreement**

24 Defendant primarily argues that through the Agreement, Plaintiff released all claims
 25 asserted in his SAC. (Doc. 14 at 10–12.) Therefore, Defendant contends that dismissal is
 26 required under either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6). (*Id.*) Plaintiff
 27 counters that he was forced to “sign away [his] rights to a claim the company had good

1 cause to believe [he] would later bring.” (Doc. 16 at 3.) Plaintiff also argues that he told
 2 Defendant he would not waive his rights and that the initial offer of payment was given to
 3 him “without conditions.” (*Id.*) In sum, Plaintiff states he signed the Agreement “in
 4 protest, knowing that it is illegal to extort a waiver of rights in exchange for labor already
 5 owed.” (*Id.*)

6 Plaintiff does not dispute that he signed the Agreement. (*See Doc. 16.*) He also
 7 does not dispute the Agreement’s meaning. The only argument Plaintiff appears to make
 8 is that the Agreement lacked consideration due to his disagreement over the nature of the
 9 payment. (Doc. 16 at 3.) However, this argument is undercut by the facts. First, the parties
 10 negotiated the terms of this payment and agreed to six weeks of pay. Once this term was
 11 reached, Plaintiff signed the Agreement the following day. (*See Doc 14-2 at 8.*) This
 12 negotiation period and the email correspondence both show that Plaintiff was not coerced
 13 into signing this Agreement. Additionally, Plaintiff’s inclusion of the words “in protest”
 14 does not render the Agreement unenforceable. Plaintiff appears to have known this, as he
 15 replied that he “understood” that writing “in protest” next to his signature did not change
 16 the enforceability of the Agreement. (*Id.* at 10.)

17 In short, Plaintiff voluntarily entered into the Agreement and knew its effect on his
 18 claims. This Agreement constitutes a valid release of the claims at issue, and therefore
 19 dismissal under Rule 12(b)(6) is required. *See Skilstaf, Inc. v. CVS Caremark Corp.*, 669
 20 F.3d 1005, 1008, 1014–20 (9th Cir. 2012) (affirming a Rule 12(b)(6) dismissal pursuant to
 21 an enforceable release); *Marder v. Lopez*, 450 F.3d 445, 447–54 (9th Cir. 2006) (same).
 22 Therefore, the Court will dismiss these claims, and in turn the SAC, with prejudice.
 23 Further, due to this dismissal under Rule 12(b)(6), the Court will not analyze potential
 24 dismissal under Rule 12(b)(1).

25 **E. Time Barred Claims**

26 As discussed, a party has 90 days to file a lawsuit after receiving a right to sue letter
 27 from the EEOC. Plaintiff was required to file his initial Complaint within ninety days of
 28 receiving notice of the EEOC’s decision. *Surrell v. California Water Service Co.*, 518 F.3d

1 1097, 1104 (9th Cir. 2008) (“Once a person receives an EEOC right-to-sue letter, she has
 2 90 days to file suit”) (citing 42 U.S.C. § 2000e-5(f)(1)); *see also Nelmida v. Shelly*
 3 *Eurocars, Inc.*, 112 F.3d 380, 383 (9th Cir. 1997) (“This ninety-day period is a statute of
 4 limitations. Therefore, if a claimant fails to file the civil action within the ninety-day period,
 5 the action is barred.”) (cleaned up). Here, Plaintiff filed his initial Complaint on June 14,
 6 2023. (Doc. 1.) This was 113 days after he received his right to sue letter from the EEOC,
 7 which was issued on February 21, 2023. (Doc. 15-2.) This also means that the Complaint
 8 was filed at least 20 days after his 90-day period to file ADA claims. (*Id.*) Accordingly,
 9 Plaintiff’s ADA claims are untimely.

10 An untimely claim is not cognizable, and therefore it must be dismissed under Rule
 11 12(b)(6). *See Hoover v. Swift Transportation Co.*, No. CV-18-03314-PHX-JAT, 2019 WL
 12 6135122, at *2 (D. Ariz. Nov. 19, 2019) (discussing dismissal under this Rule “when it is
 13 clear from the face of the complaint that a plaintiff’s claims fall outside the applicable
 14 statute of limitations”); *see also Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.
 15 1980). Plaintiff attempts to circumvent this issue by arguing that his claims are timely
 16 based on the ACRD’s Notice of Right to Sue. (Doc. 16 at 4.) However, this notice has no
 17 effect on Plaintiff’s ADA claims. As the Ninth Circuit has noted, a state agency’s right to
 18 sue letter does not trigger the 90-day period to sue under the ADA—*only* a right to sue
 19 letter from the EEOC has this effect. *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101,
 20 1111 (9th Cir. 2018).

21 In short, Plaintiff’s ADA claims are time-barred. To the extent these claims are not
 22 barred by the Agreement, they are untimely and therefore dismissed pursuant to Rule
 23 12(b)(6).

24 **IV. CONCLUSION**

25 For the above reasons,

26 **IT IS HEREBY ORDERED** granting Defendant’s Motion to Dismiss Plaintiff’s
 27 Second Amended Complaint (Doc. 14).

28 **IT IS FURTHER ORDERED** striking Plaintiff’s sur-reply (Doc. 19).

IT IS FURTHER ORDERED directing the Clerk of Court to enter final judgment consistent with this Order and close this case.

Dated this 22nd day of April, 2024.

Honorable Susan M. Brnovich
United States District Judge